IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT :

THE HONOURABLE MR. JUSTICE PIUS C.KURIAKOSE

THURSDAY, THE 27TH SEPTEMBER 2007 / 5TH ASWINA 1929

AR.No. 27 of 2007()

PETITIONERS:
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1. SMT. SUBAIDA, AGED 56,
   W/O. HAJI A.B.ABDUL KHADER, PARTNER,
   M/S. KING BEEDI COMPANY,RESIDING AT ADAKKAPARAMBIL HOUSE, MUTTICHUR P.O., PADIYAM, THRISSUR.

2. MOHAMMED NISSAM, AGED 32,
   S/O. HAJI A.B.ABDUL KHADER, MANAGING PARTNER,
   M/S. KING BEEDI COMPANY,RESIDING AT ADAKKAPARAMBIL HOUSE, MUTTICHUR P.O., PADIYAM, THRISSUR.

3. A.A. ABDUL NIZAR, AGED 28,
   S/O.HAJI A.B.ABDUL KHADER,PARTNER,
   M/S. KING BEEDI COMPANY,RESIDING AT ADAKKAPARAMBIL HOUSE, MUTTICHUR P.O., PADIYAM, THRISSUR.

4. A.A. ABDUL RAZAK, AGED 20,
   S/O.HAJI A.B.ABDUL KHADER,PARTNER,
   M/S. KING BEEDI COMPANY,RESIDING AT ADAKKAPARAMBIL HOUSE, MUTTICHUR P.O., PADIYAM, THRISSUR.

5. B.P. BASHEER ALI, AGED 53,
   S/O. USMAN, BANGLAW PARAMBIL HOUSE,ANIKODE DESOM, KARIYAMKODE POST, PUDUR, PALAKKAD DISTRICT.

BY ADV. SRI.TOM K.THOMAS

RESPONDENT:

A.A. ABDUL NAZIR, AGED 38,
S/O. (L) A.B. ABDUL KADHER, ADAKKAPARAMBIL HOUSE, RESIDING AT UNIT ROAD, EAST FORT, THRISSUR.

BY ADV. SRI.N.M.MADHU

THIS ARBITRATION REQUEST HAVING COME UP FOR ADMISSION ON 27/09/2007, THE COURT ON THE SAME DAY PASSED THE FOLLOWING:

PIUS C. KURIAKOSE,J.

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A.R.No.27 of 2007

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Dated: 27th September, 2007

ORDER

The petitioners and the respondent are partners of a partnership firm by name 'M/s.King Beedi Company'. Annexure A is the deed of partnership. Clause 21 therein is an arbitration clause which provides that any dispute or question in connection with the partnership deed or the carrying on of business or management of the partnership shall be decided by referring to arbitration of two arbitrators appointed by the parties in dispute and that the award given by the arbitrators shall be binding on all the parties in the partnership deed. By Annexure B letter, the respondent expressed his desire to retire from the partnership and through Annexure C, the petitioners, the remaining partners accepted the retirement. Alleging that in spite of his retirement, the respondent is trying to interfere with the day- to- day administration and affairs of the firm, the petitioners moved the District Court,Thrissur by filing O.P.(Arb.) No.157 of 2006 under Section 9 of the Arbitration and Conciliation Act, 1996 for interim relief. Annexure D is the order of injunction passed by the District Court in that case. The petitioners point out that Annexure D directs the parties to settle their disputes through

arbitration and that pursuant to Annexure D, they issued Annexure E letter informing the respondent regarding the panel of arbitrators to be selected for resolving the dispute. The panel contained the names of three retired Judges of this court. On receiving Annexure E, the respondent has suggested the name of another retired Judge of this court who was not agreeable to the petitioners. It is under such circumstances that the arbitration request has been filed by the petitioners under Section 11 (4) and (5) of the Arbitration and Conciliation Act, 1996 seeking appointment of an independent and impartial arbitrator.

2. A detailed counter affidavit has been filed by the respondent. It is contended therein that the A.R. is not maintainable in view of the conceded position that the respondent has already retired from the partnership. It is then contended that after obtaining Annexure D order, the petitioners did not move a little finger for initiating the arbitration proceedings. Therefore, the respondent filed O.S.No.96/07 before the Sub Court, Thirunelveli for dissolution of the firm and for rendition of accounts relating to the firm. The petitioners contended before that court that the suit is not maintainable. But that court by order dated 16.7.2007 found that the suit is maintainable. In view of

the finding by a competent civil court that a suit for settlement of the disputes which are now sought to be arbitrated is maintainable, the present A.R. is not maintainable. It is however conceded in the counter affidavit that C.R.P.No.1300/07 has been filed by the petitioners against the finding of the Sub Court, Thirunelveli that the suit is maintainable, before the Madras High Court.

3. The petitioners have filed a reply affidavit producing Annexure G order passed by the Madurai Bench of the Madras High Court. Under Annexure G, the entire proceedings in the suit before the Thirunelveli Sub Court including the order of injunction granted by that court stand stayed. Annexure H order is also relied on in this regard. Referring to Section 8 of the Arbitration and Conciliation Act, 1996, the petitioners contend that the Thirunelveli Sub Court has no jurisdiction to proceed with the suit. The petitioners rely on Annexure I judgment of this court in Arb.A.No.23 of 2006 which was filed against Annexure D order of the District Court, Thrissur.

4. I have heard the submissions of Mr.Tom K.Thomas, counsel for the petitioners and those of Mr.N.M.Madhu, counsel for the respondent. The counsel would address submissions on the basis of the pleadings raised by their respective parties.

5. Mr.Madhu would submit that the contentions of the petitioners regarding the maintainability of the suit filed before the Thirunelveli Sub Court were repelled by that court and the finding that suit is maintainable is yet to be vacated. In any event, according to the learned counsel, since the principal place of business of the partnership even according to Annexure A is Thirunelveli, it is the Chief Justice of the Madras High Court who is to be approached for appointment of arbitrator in view of Section 11(12) (b) of the Arbitration and Conciliation Act, 1996.

6. I have considered the rival submissions addressed before me in the light of the pleadings, the documents and the statutory provisions. The District Court, Thrissur, a court subordinate to this court was moved by the petitioners under Section 9 of the Arbitration and Conciliation Act, 1996 and in that motion the respondent submitted to the jurisdiction of that court. Annexure D order passed by that court was confirmed by the Division Bench of this court by Annexure I judgment. Both under Annexure D and Annexure I, it has been found that the disputes between the parties will have to be resolved through arbitration. It is true that Thirunelveli Sub Court repelled the contention of the petitioners regarding the

maintainability of the suit for dissolution of partnership and rendition of accounts virtually for settling the disputes which are now sought to be arbitrated and found that the suit is maintainable. But that finding has not attained finality. Having regard to the finality attained by Annexure D and Annexure I, it is too late in the day for the respondent to contend that the disputes are not arbitrable.

7. The contention that it is the Chief Justice of the Madras High Court who should be moved by the petitioners also cannot be accepted. Section 11(12) of the Arbitration and Conciliation Act, 1996 reads as follows:

> "(12)(a) Where the matters referred to in sub-sections (4), (5), (6), (7), (8) and (10) arise in an international commercial arbitration, the reference to "Chief Justice" in those sub-sections shall be construed as a reference to the "Chief Justice of India".
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> (b) Where the matters referred to in sub-sections (4), (5), (6), (7), (8) and (10) arise in any other arbitration, the reference to "Chief Justice" in those sub-sections shall be construed as a reference to the Chief Justice of the High Court within whose local limits the

principal Civil Court referred to in clause (e) of sub-section (1) of Section 2 is situate and, where the High Court itself is the Court referred to in that clause, to the Chief Justice of that High Court."

Section 2(1) (e) of the Arbitration and Conciliation Act, 1996 defines the term "court" as follows:

"Court" means the principal Civil Court of original jurisdiction in a district, and includes the High Court in exercise of its ordinary original civil jurisdiction, having jurisdiction to decide the questions forming the subject-matter of the arbitration if the same had been the subject-matter of a suit, but does not include any civil court of a grade inferior to such principal Civil Court, or any Court of Small Causes."

8. Though in Annexure A partnership deed the principal place of business is shown as Thirunelveli, it is not difficult to find that if a regular suit is to be instituted for settlement of the dispute regarding which the arbitration clause is being invoked, such suit will be certainly maintainable before the civil court at Thrissur in view of Section 20 (c) of the C.P.C. In fact this was why the District Court,

Thrissur was moved under Section 9 of the Arbitration and Conciliation Act, 1996 for interim measures against the respondent. Having conceded the jurisdiction of the District Court, Thrissur in the proceedings initiated by the petitioners under Section 9 of the Arbitration and Conciliation Act, 1996, the respondent is not entitled to contend that the Chief Justice of the High Court of Kerala or the Judge designated by that Chief Justice is not to be moved under Section 11(5) of the Arbitration and Conciliation Act, 1996.

9. It was conceded before me by both sides that in case this court becomes inclined to appoint an arbitrator, it is not necessary that a retired High Court Judge himself be appointed as Arbitrator. At the bar several other names were suggested and the name of Mr.P.Gopakumaran Nair, Advocate and Retired District and Sessions Judge was acceptable to both sides.

10. In the result, I allow the Arbitration Request and appoint Mr.P.Gopakumaran Nair, Advocate and Retired District and Sessions Judge, Kaloor-Kadavantra Road, Ernakulam as Arbitrator for settling all the disputes arising out of Annexure A partnership deed relating to the settlement of accounts of the respondent who retired from the partnership on 25.2.2006. The Arbitrator is free to decide on the

venue of arbitration. The Arbitrator will enter on arbitration at the earliest and pass award without undue delay.

srd **PIUS C.KURIAKOSE, JUDGE**